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IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. 39,003

CITY OF CLAYTON, A MUNICIPAL CORPORATION,
Respondent,

vs.

PAUL R. NEMOURS,
Appellant

JURISDICTIONAL STATEMENT*

The following jurisdictional statement is herewith submitted, in accordance with Rule 12 of the Rules of the Supreme Court of the United States, in connection with the appeal taken in the above entitled cause, disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 344 (U. S. C. A.) Title 28 (Judicial Code, Sec. 237, Amended), providing:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where there is drawn in question the validity of a statute of any state, on the ground of its validity, may be reviewed by the Supreme Court upon a writ of error."

* The jurisdictional statement in No. 748 is not printed. See stipulation to consolidate, page 41, infra.

The United States Supreme Court has held a statute of a state to include a Municipal Ordinance—

John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 267;
Standard Scale Co. v. *Parrell*, 249 U. S. 571;
Williams v. *Bruffy*, 96 U. S. 716;
Zucht v. *King*, 260 U. S. 174;
Reinman v. *City of Little Rock*, 237 U. S. 171;
Atlantic Coast Line, etc. v. *City of Goldsboro*, 232 U. S. 548;
Bacon v. *Texas*, 163 U. S. 207.

By an act of Congress of January 31, 1928, c-14, Par. 1, 45 Statutes at Large, p. 54, the word "appeal" was substituted for "writ of error." In the said cause there is drawn in question the validity of the said Municipal Ordinance No. 647 and the said Amendments (No. 944, No. 1056, and 1073, respectively) thereto of the City of Clayton, State of Missouri, the decision being in favor of their validity, the Appellant contending that the said holding violates the Fourteenth Amendment to the Constitution of the United States, providing:

> "Section 1. Rights of citizens—due process of law—equal protection of the laws. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes (in this case the City Ordinances of the City of Clayton, State of Missouri) the validity of which is

involved, are the following Municipal Ordinances of the City of Clayton, State of Missouri, to-wit:

1. *Ordinance No. 944* (An Amendment to Ordinance No. 647, enacted October 12, 1937, which provides as follows (R. 106)):

> "An Ordinance Amending Ordinance 647, the Traffic Ordinance, by repealing the Seventh Paragraph on Page Two in Section One of said Ordinance and by Enacting in Lieu thereof a New Paragraph.
>
> "Be it Ordained by the Board of Aldermen of the City of Clayton, Missouri, as follows:
>
> "Section 1. Ordinance No. 647, the Traffic Ordinance, shall be and the same is hereby amended by repealing the seventeenth paragraph on page two in Section 1 of said Ordinance, reading as follows:
>
> "Street or Highway. Every way or place of whatever nature open to the use of the public, as a matter of right, for purposes of vehicular travel."

and by enacting in lieu thereof a new paragraph, which shall be and read in words and figures as follows:

> "Street or Highway. Every way or place open for vehicular travel by the public, regardless of whether it has been legally established by constituted authority or by user for the statutory period of time as a public highway."

2. *Ordinance No. 1056* (an Amendment to Ordinance No. 647, enacted May 28, 1940) providing as follows (R. 107):

> "An Ordinance Repealing Ordinance #1048 and Prohibiting the Stopping, Standing or Parking of Vehicles at Certain Places on Certain Streets.
>
> "Be it Ordained by the Board of Aldermen of the City of Clayton, Missouri, as follows:
>
> "Section 1. Ordinance #1048 shall be and the same is hereby repealed.

"Section 2. The Street Commissioner is hereby directed to place standard traffic signs prohibiting the stopping, standing or parking of any vehicle at the following places, pursuant to Section 26 of Ordinance #647, to-wit:

• • • • • • •

"(2) On both sides of Glen Ridge Between Clayton Road and Cromwell Drive.

"Section 3. This ordinance shall take effect and be in force from and after its passage and approval by the Mayor.

"Approved this 28th day of May, 1940.

A. H. KERTH,
Mayor and Ex-Officio President of the Board of Aldermen.

"Passed this 28th day of May, 1940.

A. H. KERTH,
Mayor.

"Attest:

EDWARD J. KALLAHER,
City Clerk."

3. *Ordinance No. 1073* (an Amendment to Ordinance No. 647), enacted August 27, 1940, which provides as follows (R. 108):

"An Ordinance Amending Ordinance No. 1056 Prohibiting the Stopping, Standing or Parking of Vehicles on Certain Streets.

"Be it Ordained by the Board of Aldermen of the City of Clayton, Missouri, as follows:

"Section 1. Ordinance #1056 shall be and the same is hereby amended by repealing paragraph (e) of Section 2 of said ordinance and by inserting in lieu thereof a new paragraph to be known as paragraph (e) of said

Section 2 which shall be and read in words and figures as follows:

"(e) On both sides of Glen Ridge between Clayton Road and a point 115 feet north of Clayton Road."

"Section 2. This ordinance shall take effect and be in force from and after its passage and approval by the Mayor.

"Approved this 27th day of August, 1940.

A. H. KERTH,
Mayor and Ex-Officio President of the Board of Aldermen.

"Passed this 27th day of August, 1940

A. H. KERTH,
Mayor.

"Attest:

EDWARD J. KALLAHER,
City Clerk."

The above Ordinances are found in the Municipal Ordinances of the City of Clayton, State of Missouri.

The date of the judgment sought to be reviewed is September 5, 1944.

The date upon which the Application for Appeal is presented is November 21, 1944.

The nature of the case is as follows:

The above-named Respondent filed a complaint for a traffic violation before the police judge in the City of Clayton, County of St. Louis, State of Missouri, on the 28th day of August, 1943, wherein one Gerald Smith, a police officer, charged a violation of Ordinance No. 647 in relation to regulating traffic upon the *public* streets of the City of Clayton, charging that on the 16th day of August, 1943, in the City of Clayton and within the city limits thereof, Paul E. Nemours did then and there unlawfully park his automobile in a "No Parking Zone" on the west side of Glen Ridge Avenue at or near its intersection with Clayton Road, at a

point where parking is prohibited by said Ordinance. The said complaint was filed pursuant to an arrest notice dated August 16, 1943. The appellant filed an answer in the said Police Court stating that Glen Ridge Avenue, at the time and place of the arrest, was a private way owned in fee by residents of Moorlands Addition, and that he was so using Glen Ridge Avenue when arrested and charged with violating the Ordinance in question. That the said City of Clayton attempted to change the legal status of Glen Ridge Avenue from a private way to a public street and to control it as such, and attempted to mark said private way with traffic signs as though it were a public street, and to occupy it with traffic equipment and signs, and to use and occupy it for the purpose of controlling public travel on Clayton Road, and to deprive the defendant of its use, and to deprive defendant of private property without due process of law, without compensation, and to take said property for public use by legislative enactment and without judicial proceedings, and to take it for the private use and convenience of other lot owners. By amendment of the Ordinance passed August 27, 1940 (R. 108), it was provided that there should be "No parking on both sides of Glen Ridge Avenue between Clayton Road and a point 115 feet North of Clayton Road." As a practical proposition, appellant's mother and appellant, who lives with his mother in the house at the northeast corner of Glen Ridge Avenue and Clayton Road, were the only ones damaged by this Ordinance, the northwest corner of Clayton and Glen Ridge being a vacant lot (See Ex. 1, R. 108). It was further set out in the Answer that the Ordinances were void and unenforceable because in violation of the provisions of Section 20, 21, and 30, Article II of the Constitution of the State of Missouri, and in violation of and in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States; that it deprived appellant of the use of said Private way as an

access to his home and prevented him from using the property and from using proprietary rights therein; that the Ordinance in effect determined by legislation that the private way was in fact being put to public use, and that it prohibits him from parking in front of his house, without judicial action, without compensating him, and was in effect the taking of property without due process of law. That it deprived him of the equal protection of the law, or in other words, improperly and unjustly discriminated against him. Appellant was found guilty on the 28th day of August, 1943, and there was a fine assessed against him in the sum of $5.00 and on appeal was taken to the Circuit Court of St. Louis County and upon a trial de novo, submitted in Division No. 2 of the said Circuit Court, appellant was again fined $5.00. He duly filed his motion for a new trial, within the proper time, renewing his contentions and constitutional claims, both State and Federal, which motion was overruled, and the cause was duly appealed to the Supreme Court of the State of Missouri, which was the Court having jurisdiction on appeal from said Circuit Court. The said judgment was affirmed by Division No. 2 of the Supreme Court of the State of Missouri on the 5th day of July, 1944. A motion for rehearing and to transfer to the Court en banc was filed within the proper time and was overruled on September 5th, 1944, and has become a final judgment. No further steps can be taken in any Missouri Court, and appellant's only remedy lies in an appeal to the Supreme Court of the United States from the said final judgment.

The cases believed by appellant to sustain the jurisdiction under this paragraph giving the nature of the case, are as follows:

Nectow v. *Cambridge*, 277 U. S. 183; 48 S. Ct. 447, 72 L. Ed. 842;

Jacobs v. *United States*, 290 U. S. 13;

Pumpelly v. *Green Bay Miss. Canal Co.*, 80 U. S. 166;

United States v. *Cress*, 243 U. S. 316;
State of Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A. L. R. 654;
United States v. *Lynah*, 180 U. S. 445;
Abie State Bank v. *Bryan*, 282 U. S. 765, 51 S. Ct. 252, 257, 75 L. Ed. 690.

The constitutionality of the question was immediately raised by an Answer filed in the Police Court (R. 8); thereafter the constitutionality of the question was kept alive in the Circuit Court of the County of St. Louis, Division 2 thereof, in Motion for New Trial (R. 15), and was thereafter kept alive in the Supreme Court of the State of Missouri by appeal duly taken and perfected on the 22d day of January, 1944, through all stages of the proceedings in that court, and in each instance the court in question overruled the points raised touching the constitutionality of the issues.

The Supreme Court of Missouri held that a Municipality may prohibit, within reasonable limits, the parking of automobiles on a privately owned and maintained street permitted to be used and used by the public at large for vehicular traffic. It is contended that the Missouri Supreme Court also improperly held that there was no issue that the ordinance involved was invalid because of any arbitrary or unreasonable exercise of power, if power of enactment existed, that constitutional provisions preclude the valid exercise of the attemped power. The Court held that there is no appropriating of private property to public use. The Court further held that Glen Ridge Avenue, the street in question, although privately owned was devoted to a public use by the owners thereof and that the municipality exercising its governmental function referable to the police power, regulated in a reasonable manner such public user for the protection and in the interest of the public safety,

health, and welfare. The Supreme Court held in effect that there was legitimate police regulation of the use of private property and that any loss arising therefrom is *damnum absque injuria;* that the property owner was not being deprived of his property within the due process of law or just compensation provisions of the constitutions, federal and state. The Supreme Court of Missouri so held in spite of the fact that the record (P. 25) shows that the municipality had erected buttons on the street at or near the intersection and other regulating devices, unquestionably sufficient to constitute a taking.

The questions involved are substantial because they involve the constitutional right of the appellant herein set out and involve a principle that is far reaching and of great interest all over the United States where privately owned streets are permitted to be used during certain times of the year by the public, the street in question being shut off two weeks during the year, with no particular weeks designated (R. 45). The decision of this Court will determine whether or not a municipality has the right to enact traffic ordinances over privately owned streets, and to take possession and erect traffic contrivances.

There is appended hereto a copy of the opinion of the Supreme Court delivered upon the rendering of the judgment sought to be reviewed. Earlier companion cases, referred to in the opinion of the Supreme Court of Missouri, are: *City of Clayton* v. *Nemours* (Mo. App.) 164 S. W. 2d 935, and *Nemours* v. *City of Clayton* (Mo. App.) 175 S. W. 2d 60, in which the Appellant was involved, having similar questions, but where the present issues were not fully raised.

Respectfully submitted,

J. L. London,
Counsel for Appellant,
1105 Commerce Bldg.,
St. Louis, Missouri.

APPENDIX "A"

IN THE SUPREME COURT OF MISSOURI

DIVISION NUMBER TWO

MAY TERM, 1944

No. 39,003

CITY OF CLAYTON, a Municipal Corporation, *Respondent,*

vs.

PAUL R. NEMOURS, *Appellant.*

No. 39,004

CITY OF CLAYTON, a Municipal Corporation, *Respondent,*

vs.

MRS. A. NEMOURS, *Appellant.*

We answer the question here presented in the affirmative; that is: A municipality may prohibit, within reasonable limits, the parking of automobiles on a privately owned and maintained street permitted to be used and used by the public at large for vehicular traffic. No issue exists that the ordinance involved is invalid because of any arbitrary or unreasonable exercise of power, if power of enactment existed; the contention being, broadly stated, that constitutional provisions preclude the valid exercise of the attempted power. Much detail of statement may therefore be avoided; but those interested will find the facts in City of Clayton v. Nemours (Mo. App.), 164 S. W. 2d 935, and Nemours v. City of Clayton (Mo. App.), 175 S. W. 2d 60, to which reference is made. Mrs. A. Nemours (appellant-defendant in cause No. 39004) and Paul R. Nemours (appellant-defendant in cause No. 39003) are mother and son, liv-

ing together in the mother's property at the intersection of Glen Ridge avenue and Clayton road (7477 Clayton road), Clayton, Missouri. A disposition of one appeal disposes of the other as the constitutive facts are similar.

The appeals are from judgments imposing a fine of $5 each for the violation of ordinance provisions of the City of Clayton prohibiting the parking of automobiles on Glen Ridge avenue (within specified limits which abut on Mrs. Nemours' property), a privately owned and maintained thoroughfare or street used by the public at large within Moorland's addition of said city. The title to said street rests in trustees for the use and benefit of the lot owners of Moorland's addition. The City does not claim that the public user rests upon any right arising from dedication, condemnation or prescription. Its use by the public has been with the owners' knowledge and consent; and, under the evidence favorable to the City, was established to have existed and continued since about 1930. It was described as particularly heavy in the morning and evening rush hours. Glen Ridge avenue connects Clayton road and Wydown boulevard. Clayton road is heavily traveled and connects with the super highway in Forest Park leading to and from downtown St. Louis.

Subsequent to the public user of Glen Ridge avenue the City enacted on November 10, 1936, ordinance No. 647, the title reading: "An ordinance regulating traffic upon the public streets of the city of Clayton, Missouri * * *."

Section 1 thereof defined a "Street or highway. Every way or place of whatever nature, open to the use of the public, as a matter of right, for the purposes of vehicular travel." Glen Ridge avenue was not a public street under this definition.

October 12, 1937, the City by ordinance No. 944 amended Sec. 1 of ordinance No. 647 so as to read: "Street or highway. Every way or place open for vehicular travel by the public, regardless of its legal status and regardless of whether it has been legally established by constituted authority or by user for the statutory period of time as a public highway."

The original ordinance (No. 647) defined and prohibited the "parking" of vehicles in certain locations. It was amended in this respect on May 28, 1940, and again on August 27, 1940. Defendant violated said parking law, if valid, by parking his automobile on Glen Ridge avenue within 115 feet north of Clayton road. For ordinance provisions consult City of Clayton *v.* Nemours, 164 S. W. 2d l. c. 939.

As we read the brief, defendant contends Glen Ridge avenue was established in 1923 as a private way in which defendant, as abutting property owner (the son being a member of the mother's family), held vested property rights of which defendant was deprived without due process of law contra to Sec. 30, Art. II, Mo. Const., and the 14th and 5th Amends., U. S. Const. in that (1) the municipality's ordinance definition of "public streets" was changed so as to include Glen Ridge avenue without notice or other formality to defendant and (2) thereafter, by ordinance, it was made unlawful to park thereon, et cetera, in the interest of the public without notice or other formality. Also (3) that the City determined by legislation that Glen Ridge avenue was a public street whereas whether the use was public was a question for judicial determination under Sec. 20, Art. II, Mo. Const.; and (4) that defendant's private property (interest in the private way) was taken for public use without just compensation contra to Sec. 21, Art. II, Mo. Const., and Amend. 5, U. S. Const.

Section 20, Art. II, Mo. Const., prohibits the taking of private property for private use and, "whenever an attempt is made to take private property for a use alleged to be public," makes the question whether the "use be really public" a "judicial question" to be "judicially determined, without resort to any legislative assertion that the use is public." The provision has no application here; because, for one reason, there is no attempt to prevent a judicial determination of whether the use is public.

Defendant's basic premise is wrong. Instead of the municipality appropriating private property to a public use, there was evidence that Glen Ridge avenue was devoted to a public use by the owners thereof and the munici-

pality thereafter, exercising its governmental function referable to the police power, regulated in a reasonable manner such public user for the protection and in the interest of the public safety, health and welfare.

It is established that the reasonable regulation of the traffic on the public highways is an exercise of the police power, including regulating the parking of automobiles thereon. Cavanaugh v. Gerk (Banc), 313 Mo. 375, 380 (I), 280 S. W. 51 52(1); City of Clayton v. Nemours (Mo. App.), 164 S. W. 2d 935, 942(16); 40 C. J. S. p. 240, Sec. 232. Consult Secs. 7172 and 8395, R. S. 1939. The police power is very broad, although not unlimited. It is an incidence to private property titles, its foundation being the control of private interests for the public welfare. Kingshighway Presbyterian Church v. Sun Realty Co., 324 Mo. 510, 515, 24 S. W. 2d 108, 110(5), stating: "Every citizen holds his property subject to the valid exercise of the police power * * *." Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 980(I), 13 S. W. 2d 634(1) and cases cited; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, 84. Legitimate exercises of the police power may interfere with what laymen would ordinarily consider the private property rights of individuals. Loss arising from a legitimate police regulation of the use of private property is damnum absque injuria; the property owner being not deprived of his property within the due process of law or just compensation provisions of the constitutions. Consult cases supra: Max v. Barnard-Bolckow Drainage Dist., 326 Mo. 723, 731, 32 S. W. 2d 583, 586(7); Clutter v. Blankenship, 346 Mo. 961, 964(3), 144 S. W. 2d 119, 121 (5-7); Carson v. Missouri, K. & T. Ry. Co. (Mo.), 184 S. W. 1039, 1040(1); State ex rel. Becker v. Wellston Sewer Dist. (Banc), 332 Mo. 547, 561(5-7), 58 S. W. 2d 988, 992(7, 8); Star Square Auto Sup. Co. v. Gark, 325 Mo. 968, 993 (V, VIII), 30 S. W. 2d 447, 459(10, 14); St. Louis Poster Adv. Co. v. St. Louis, 249 U. S. 269, 274, 39 S. Ct. 274, 63 L. Ed. 599; affirming (Mo. Banc), 195 S. W. 717, following St. Louis Gunning Co. vs. St. Louis, 235 Mo. 99, 137 S. W. 929.

In the instant case, sufficient for the purpose of this review Glen Ridge avenue was devoted, although not dedi-

cated, to the public use by acts of the owners. It was not taken over by the municipality. In so devoting the use of their property, the owners constituted Glen Ridge avenue a de facto although not a de jure public street within the meaning of statutory and ordinance provisions, the word public, when applied to highways, not being restricted to connote ownership alone but in proper instances being employed to describe the use. In determining whether a way is a public or private highway, the use to which the way is put; i. e., whether public or private, is of greater importance than its ownership, its mode of creation or its designation as public or private; because it would tend to create confusion and danger to the traveling public if privately owned highways open to and used by the general public enforced their own rules of the road, free from legitimate public regulation, upon travelers leaving the publicly owned highways and entering upon the privately owned ways; for instance, a requirement of operation on the left hand side of the way et cetera. Consequently: "The law of the road extends to all public highways, however, created, and may also be applicable to roads not public highways, if used for travel." 40 C. J. S. 256 b. To the extent of the public interest thus created by the owners, they subjected Glen Ridge avenue to reasonable police regulations in the furtherance of the public safety, health, and welfare. In accord: 37 Am. Jur. p. 971, n 20; Phillips v. Henson, 326 Mo. 282, 291, 30 S. W. 2d 1056, 1068(8); City of Clayton v. Nemours (Mo. App.), 164 S. W. 2d 939, 938(7 et seq.); Nemours v. City of Clayton (Mo. App.), 175 S. W. 2d 60, 65 (1 et seq.); Crocker v. Jett (Mo. App.), 93 S. W. 2d 74, 76(1, 2); Crossler v. Safeway Stores, Inc., 51 Idaho 413, 6 Pac. 2d 151, 80 A. L. R. 463, and annotation; Weirich v. State, 140 Wis. 98, 121 N. W. 652, 22 L. R. A. (N. S.) 1221, 17 Ann. Cas. 802; Commonwealth v. Gammons, 23 Pick. (Mass.), 201; Walton v. St. Louis, I. M. & S. Ry. Co., 67 Mo. 56, 57. Other authorities are mentioned in those cited.

This review is at an end, it having been determined that Glen Ridge avenue was a public street and subject to reasonable municipal police regulations, including the park-

ing of automobile. See also 42 C. J. p. 627, Sec. 34; 5 Am. Jur. p. 551, Sec. 59; 25 Am. Jur. p. 602, Sec. 309.

The judgments are affirmed.

WALTER H. BOHLING,
Commissioner.

WESTHUES, *C.* Concurs.
BARRETT, *C.* Concurs.

Per Curiam: the foregoing opinion, by Bohling, C., is adopted as the opinion of the Court. All the judges concur.

IN THE SUPREME COURT OF THE UNITED STATES

No. 39,003. (Mo. Sup. Ct.)

CITY OF CLAYTON, a Municipal Corporation, *Respondent.*

vs.

PAUL R. NEMOURS, *Appellant*

Supplemental Jurisdictional Statement

The following supplemental jurisdictional statement is herewith submitted in addition to the jurisdictional statement heretofore filed.

Appellant has heretofore set out in the jurisdictional statement the fact that the federal question involved in this case was raised immediately in the answer to the information which was filed. (R. 8.)

We desire to herein set out more fully the manner in which the constitutional question involved was kept alive, and more particularly because of the fact that under the Missouri State practice the assignments of error do not appear in the record. They appear in the brief, and we therefore will quote briefly from the brief.

The constitutional question in issue was immediately raised by the answer which was filed (R. 8-14). The case

was duly tried on December 20, 1943, and the appellant was found guilty and the fine was assessed at $5.00. On the 22d day of December, 1943, within the statutory four-day period for the filing of a motion for new trial, the said motion for new trial was duly filed and the constitutional question was again raised (R. 15-17). The said motion for new trial was duly overruled on January 17, 1944. An appeal was duly perfected on January 22, 1944, to the Supreme Court of Missouri.

The record contains the bill of exceptions (R. 19 et seq.). In the Supreme Court of Missouri it was stipulated that the evidence adduced in the case of City of Clayton vs. Paul R. Nemours and the bill of exceptions in that case be taken as the evidence and bill of exceptions in the case of City of Clayton vs. Mrs. A. Nemours, with the exception of the fact that in the Paul R. Nemours case the automobile was parked on the west side of Glen Ridge Avenue, while in the Mrs. A. Nemours case the automobile was parked on the east side of Glen Ridge Avenue. (R. 19.) A jury was waived (R. 21).

When the ordinances were offered in evidence they were objected to as unconstitutional and as violating both the State and Federal Constitution (R. 21, 22). The ordinances were again offered as Exhibits A to D, and duly objected to with the same ruling (R. 23).

At the close of the plaintiff's case, that is, the City of Clayton, the constitutionality of the ordinances in question was again challenged in the following form (R. 77).

> "Mr. Coffman: Now, if the Court please, we filed this answer and raised constitutional questions, and we also object to the introduction of evidence and the introduction of these ordinances; based upon our claim, these ordinances are unconstitutional and, since the Supreme Court says we must keep that alive, I necessarily must make the same objection now and ask for a dismissal or an acquittal on the ground that the ordinances offered in evidence and upon which the plaintiff's case is presented, is unconstitutional in respect to what we set forth in our answer.

"The Court: The motion will be overruled.

"To which ruling of the Court defendants then and there duly excepted and still continue to except."

At the close of all of the evidence in the case, the constitutionality of the said ordinances was again challenged, overruled and exception duly saved (R. 98).

On December 20, 1943, after having the matter under advisement, the Court entered the finding that the defendant was guilty of violating the ordinances charged and fined $5.00 and costs, exception being duly saved (R. 99).

We have shown that the motion for new trial was duly filed within the statutory time and the appeal was duly perfected to the Supreme Court of Missouri (R. 99).

In the brief which was filed in the Supreme Court of Missouri, the assignment of error was that—

> "The Court erred in failing to declare and adjudge that the enforcement of ordinances Nos. 647, 944, 1056 and 1073, with respect to Glen Ridge, the private way, would infringe the vested property rights of defendant in said private way, guaranteed by Sections 20, 21 and 30, Article II of the Constitution of Missouri, and the Fifth and Fourteenth Amendments of the United States Constitution, and in failing therefore to find defendant not guilty." (Appellant's Statement, Brief and Argument, p. 10).

The following points were made in appellant's brief which was filed in the Supreme Court of Missouri:

"1. By ordinance 944, respondent City changed its definition of "street" from—

> "Every way or place of whatever nature open to the use of the public, as a matter of right, for the purpose of vehicular travel,"

to—

> "Every way or place open for vehicular travel by the public, regardless of its legal status • • •"

It occurs, therefore, that until such change of definition, Glen Ridge was a private way, and defendant owned it as such even if it was then "open for vehicular travel by the public."

But when the change of definition became effective, it then became a "public street of the City of Clayton," and defendant lost the proprietary rights therein and no longer owned it as a private way.

Thus, without more formality or notice, defendant was deprived of this private property. This is not due process. It is violative of the organic law.

Section 30, Article II, Missouri Constitution;
Fourteenth and Fifth Amendments to United States Constitution;
Paving Co. v. Ridge, 169 Mo. 376, 386.

"2. After such change of definition, and without any hearing or inquiry or notice or other formality to determine whether in fact Glen Ridge was so used as to become a public street within the meaning of said ordinance, respondent City, by its own legislative acts, namely, the passage of Ordinances Nos. 1056 and 1073, regulating traffic on its "public Streets," determined that it was so used and was therefore a public street, because, by said ordinances, it authorized the placing thereon of its traffic signs and made it unlawful to park thereon, and began using it in the interest of the public.

Defendant was thus deprived of the property rights in said private street without due process, in violation of the organic law.

Ibid. Authorities, Point I.

"3. By legislating that Glen Ridge was so used as to make it a public street within the meaning of the ordinance, and by legislating that it was, therefore, to be used for a purpose allegedly public, that is, be used to control traffic, not only on it, but also that on Clayton road, the public highway, respondent determined such matters for itself by legislative enactment. This is violation of the Constitution of Missouri, which provides that such questions are for judicial determination.

Section 20, Article II, Constitution of Missouri;
State ex rel. v. West, 272 Mo. 304, 318; and
City of Kirkwood vs. Venable, 173 S. W. (2d) 8, 11;
Authorities Point I (ibid.)

"4. By the acts of plaintiff, in converting Glen Ridge from a private to a public way by ordinance, and by occupying and using it in the interest, as claimed, of the public, under the claimed authority created by said ordinances, defendant's private property was "taken or damaged for public use" and defendant was divested of "the proprietary rights therein" without just compensation, all in violation of the organic law.

Section 21, Article II, Constitution of Missouri;
Fifth Amendment, Constitution of the United States."
(Appellant's brief, pp. 11-12.)

We have heretofore appended to the jurisdictional statement the opinion of the Supreme Court of Missouri in this case. The same is reported in 182 S. W. (2d) 57.

We have also made reference to what were designated as earlier companion cases referred to in the opinion of the Supreme Court of Missouri, namely, City of Clayton vs. Nemours (Mo. App.) 164 S. W. (2d) 935 and Nemours v. City of Clayton (Mo. App.) 175 S. W. (2d) 60. The constitutional issues herein presented were not there fully raised and while we do not believe that such opinions come strictly within the purview of the requirements of Rule 12, we are attaching copies of the opinions in those cases to this supplemental statement, in order to facilitate the labors of the Court.

Respectfully submitted,

J. L. London,
Attorney for Appellant.

APPENDIX "B"

IN THE ST. LOUIS COURT OF APPEALS

No. 26,507

175 S. W. 2nd 60

ALANDA NEMOURS and DR. PAUL R. NEMOURS

vs.

CITY OF CLAYTON, a Municipal Corporation, et al.

This is a suit for an injunction by which plaintiffs, mother and son, seek to enjoin the City of Clayton and its municipal officers from the maintenance and enforcement of certain traffic regulations at the junction of Glen Ridge Avenue with Clayton Road at a point within the territorial limits of said city. From a decree in favor of defendants dismissing plaintiffs' petition, the latter appealed to the Supreme Court, which found, however, that it was without jurisdiction, and consequently ordered that the cause be transferred here. Nemours vs. City of Clayton, Mo. Sup. 172 S. W. 2d 937.

The controversy in the case grows out of the status of Glen Ridge Avenue as a privately owned and maintained street in what is known as Moorlands Addition, a restricted residential area located within the corporate limits of defendant city.

Moorlands Addition, as it now exists, comprises an area of about 105 acres, and is bounded on the east by Audubon Drive; on the west by Westwood Drive; on the north by Wydown Boulevard; and on the south by Clayton Road. Audubon Drive and Westwood Drive are only two blocks apart, and between them, and running parallel with them, is Glen Ridge Avenue, which extends from Wydown Boulevard on the north to Clayton Road on the south. Glen Ridge Avenue lies wholly within the Addition, and terminates, at either end, at its point of junction with Wydown Boulevard

and Clayton Road. Between Wydown Boulevard and Clayton Road are some seven intervening streets or drives, all of which run east and west, and either intersect or connect with Glen Ridge Avenue so as to facilitate the diversion of traffic upon it.

By an original indenture under date of December 11, 1922, title to all the streets in the district laid out and platted as Moorlands Addition was vested in three designated trustees and their survivors and successors, to hold the same as joint tenants, until the death of the last survivor, for the exclusive use and enjoyment of the owners of lots in the Addition and their heirs and assigns. The trustees thus appointed were impressed with the duty of thereafter caring for and maintaining such streets, in pursuance of which they were empowered to levy assessments to be apportioned in a manner specified in the instrument. They were also authorized to maintain and repair sewers, pipes, wires, and other structures upon, over, and under the streets, with the right and power to grant to any person or corporation undertaking to furnish electricity, heat, light, water, power, or gas, or any convenience for a residence district, the right to place the necessary wires, pipes, conduits, or other improvements upon, in, or under said streets, easement strips, tracts, or parcels of land.

It was expressly recited that all persons who might from time to time be owners of the lots in the Addition, together with their respective proper families, should have free access to the streets, with the right to frequent, use, and enjoy the same as places of passage, subject, however, to such reasonable rules and regulations as the trustees and the lot owners themselves might from time to time make and prescribe; and that such right of access, and the right to frequent, use, and enjoy the streets for the purpose indicated, should constitute an easement therein for the benefit of each of the lots located in the Addition, and should forever pass as appurtenant to each of the lots, subject to the right to vacate any such private street as elsewhere provided in the indenture.

Provision was made that upon the death of the last survivor of the three trustees originally designated in the instrument, title to the streets should thereupon vest in the

then owners of the lots located in the Addition as tenants in common, such title to be free of the trust theretofore imposed, but subject to all the continuing easements, conditions, restrictions, covenants, and charges made applicable thereto and binding thereon. It was provided, however, that upon such termination of the trust, the owners of the lots might elect to continue and perpetuate its general object and intent by adopting such reasonable rules and regulations with respect to the use and maintenance of the streets as would be consistent with the terms, conditions, and restrictions expressed in the instrument; and that for the accomplishment of such purpose they might choose and appoint agents to act for them, whose powers and duties in that capacity should be substantially the same as those of the original trustees. As a matter of fact, this very contingency had come to pass before the inception of the present controversy; and at all times involved in this proceeding, the management and control of the subdivision was vested in three agents who had been chosen from among the owners of lots in the Addition as indicated by an instrument prepared and filed of record on January 9, 1934.

Plaintiffs reside in the extreme southwestern corner of the Addition in a residence which fronts on Clayton Road on the south and abuts on Glen Ridge Avenue on the west. While the mother, Alanda Nemours, is the sole owner of the property, her son, Dr. Paul R. Nemours, resides with her as a proper member of the family within the contemplation of the above indenture; and hence it is that they are joined together as coplaintiffs in this proceeding by which they attempt to enjoin the city and its municipal officers from the maintenance and enforcement of the traffic regulations of which complaint is made.

Notwithstanding the status of Glen Ridge Avenue as a private street wholly owned and maintained by the owners of the lots in the Addition, the evidence was undisputed that save for a week or two each year when its north and south ends are closed off alternately, it is not only permitted to be open for public traffic, but indeed is extensively used for traffic, both by persons residing in the Addition, and also by those members of the general public who have business in the Addition or who may desire and have occasion to

make use of such street as a thoroughfare between Clayton Road and Wydown Boulevard. In other words, so far as its use is concerned, it is to all intents and purposes a public street, and is regularly made use of by automobiles, trucks, and other vehicles, just as is true of all the other privately owned streets in the Addition. This is of course not to say that there is any actual invitation extended to the public, but only that the public is allowed to use the street with the knowledge and tacit consent of the owners of the lots and their agents so as to have amounted to an implied grant of a license for such use, subject only to the right of revocation at any time the owners may so elect. Despite the character of use allowed, there is no question but that the street remains the property of the lot owners as tenants in common; and the city expressly disavows any claim of title to the street as the authority for the regulations which it has heretofore imposed.

The evidence disclosed that not only has Glen Ridge Avenue been subject to public use since the opening up of the Addition in 1923, but that in the succeeding years as the surrounding territory became more thickly populated, its use as a traffic artery was greatly intensified, particularly during the rush hours each morning and evening. While the original indenture had restricted the character of the improvements in the Addition to private residences to be occupied by one family only, the territory lying immediately west of Glen Ridge Avenue was subsequently detached from the Addition and converted into a subdivision known as Blue Ridge Terrace, which was given over to the erection of multiple dwellings and apartments, some for as many as thirty-two families. This was said to have been the most important single factor in increasing the volume of traffic on Glen Ridge Avenue, and was shown to have resulted, along with other factors, in producing, a greater burden of traffic on Glen Ridge Avenue than upon any other of the streets in the whole Addition.

Clayton Road, with which the south end of Glen Ridge Avenue joins, is a very heavily traveled public highway leading from St. Louis County into the City of St. Louis, and connecting with the express highway through Forest Park which has been built to facilitate the rapid movement

of through traffic into and out of downtown St. Louis. It has also been designated as a unit of the national highway system east and west, so that it not only serves as a convenience to persons residing in the general metropolitan area of the City of St. Louis, but is extensively used as well by all types of cross-country traffic moving through St. Louis in either direction to points on beyond.

The inevitable consequence of the situation thus presented was to create a serious traffic hazard at the junction of Glen Ridge Avenue with Clayton Road, making it extremely dangerous for motorists to turn into or off of Glen Ridge Avenue, especially when the traffic was at its peak during the morning and evening hours. Moreover, there was the question of the peril to the school children residing in the Lake Forest area south of Clayton Road, who were compelled to cross Clayton Road twice a day in going to and from the Glen Ridge School, which is located on Glen Ridge Avenue some three or four blocks north of Clayton Road. While the Lake Forest area is outside the corporate limits of the City of Clayton, it appears that it is nevertheless within the district which is served by the Glen Ridge School.

With a view to relieving such condition, negotiations were begun in 1939 between the agents of the lot owners on the one hand and the officials of the City of Clayton on the other with respect to the installation by the city of a suitable system of automatic traffic control signals at the point of junction of Glen Ridge Avenue with Clayton Road. Because of the status of Glen Ridge Avenue as a private street, the city officials, before undertaking to proceed, were desirous of securing an easement or grant of authority from the agents of the owners; and to this end the three regularly constituted agents, on December 2, 1939, executed an instrument in writing in which, after reciting that in their opinion a traffic hazard existed upon Glen Ridge Avenue at and near its junction with Clayton Road and that the City of Clayton had been asked to provide the necessary system of automatic traffic signals for the control of traffic at that point, they purportedly granted authority to the city to install such a system of signals, with the right to maintain and

perpetually operate the same as the property of the city.

Recognizing the necessity that the authority for the grant of such an easement should be derived from the terms of the original indenture providing for the appointment of trustees and agents and prescribing their respective powers and functions, the agents sought to predicate their action in this instance upon the provision of the indenture empowering the trustees to grant to any person or corporation undertaking to furnish electricity, heat, light, water, power, or gas, "or any convenience for a residence district", the right to place the necessary wires, pipes, conduits, or other implements upon, in, or under the streets, easement strips, tracts, or parcels of land.

Defendants contend, as the evidence did indeed disclose, that the installation of the traffic control system at the point in question was a great convenience to the residents of the Addition in attempting to drive their automobiles into or off of Glen Ridge Avenue, and they insist that the convenience thus afforded them was within the fair contemplation of the grant of power in the indenture. Plaintiffs argue, on the other hand, that agents appointed under the indenture did not succeed to all the powers of the original trustees; that the easement in question, even if it had been purportedly given by vote of the lot owners themselves, would have been invalid as inconsistent with the general objects and purposes of the trust, which gave the owners the right to frequent and enjoy the streets as private streets and as means of access to their homes; and that in any event, with due observance of the rule of ejusdem generis, the reference in the indenture to "any convenience for a residence district" must be limited to a convenience of the same general character as electricity, heat, light, water, power, or gas, and may not be extended to include a traffic control system, however convenient such a system might actually prove to be.

Whatever may be the merits of this particular dispute, the result in the case is not dependent upon it, since the city, in defending its right to regulate traffic at the point in question, asserts the authority of the police power, and only relies upon the easement as allegedly constituting an estoppel against plaintiffs as owners to disavow the action

of their agents. Consequently, as the case is presented for our determination, the chief importance of the matter is that it at least evinces the city's complete good faith in attempting to relieve a traffic hazard which the agents themselves had recognized and had asked to be corrected.

At the conclusion of the negotiations between the city and the agents, the city began the enactment of appropriate ordinances to put the proposal into effect, and as a first step amended its general ordinance regulating traffic upon the "public streets" of the City of Clayton so as to define the terms "street or highway" to mean "every way or place open for vehicular travel by the public, regardless of its legal status and regardless of whether it has been legally established by constituted authority or by user for the statutory period of time as a public highway". By subsequent enactment, the street commissioner was directed to place standard traffic signs prohibiting the stopping, standing, or parking of any vehicle "on both sides of Glen Ridge between Clayton Road and a point 115 feet north of Clayton Road."

The control system selected by the city is of the traffic actuated type, and consists of two signal light standards erected on either side of Clayton Road at the point of junction with Glen Ridge Avenue, which standards show green at all times for the traffic upon Clayton Road except when the wheel of an automobile on Glen Ridge Avenue, which expects to enter Clayton Road by a left turn to the east, comes in contact with a metal pad which is laid flush with the surface of Glen Ridge Avenue, and is connected with the standards on Clayton Road by underground wires or cables. Contact with the metal pad causes the lights to turn red in both directions on Clayton Road, and thereby stops traffic and permits the automobile on Glen Ridge Avenue to proceed to make its left turn without being subjected to the hazard of rapidly moving traffic on Clayton Road. For the convenience of the public, lines or markers have been placed on the surface of Glen Ridge Avenue, dividing the whole of the 26 feet of its paved width into three traffic lanes, in the center one of which has been placed the metal pad which permits the making of a left turn into Clayton

Road. The east lane is used by vehicles which may at all times make a right turn from Clayton Road into Glen Ridge Avenue, while the west lane permits a right turn at all times from Glen Ridge Avenue into Clayton Road.

The chief complainant was Dr. Paul R. Nemours, who was largely aggrieved at two things, the first, the division of the entire street alongside his home into traffic lanes; and the second, the prohibition of parking along either side of Glen Ridge Avenue for a distance of 115 feet north of Clayton Road. There was no complaint about the erection of the two signal light standards on Clayton Road, which is a public street and therefore unquestionably subject to the city's supervision; nor did he complain of "speed limit 20 miles an hour" and "look out for children" signs which had been placed along the curb, not by the city, but by the agents of the subdivision.

Admitting the obvious fact that the three traffic lanes in no sense constituted a physical obstruction, it was Dr. Nemours' contention that they none the less obstructed the entrance to the driveway which leads into his garage, in that it was impossible for him to turn into his driveway without violating the law by entering upon the middle lane which is set apart for left turn traffic moving south. The city's answer to this was that such traffic lanes had been marked off solely for the convenience of the traveling public in driving into or off of Glen Ridge Avenue, and that Dr. Nemours would violate no ordinance in crossing over upon the center lane preparatory to turning into his driveway.

The more serious complaint was the one directed to the prohibition against parking on either side of Glen Ridge Avenue for a distance of 115 feet north of Clayton Road. It was undisputed that the establishment of such no-parking zone left Dr. Nemours with no room in which to park his car alongside the Glen Ridge Avenue side of his home, which was all the more disadvantageous and unsatisfactory to him in that there is a similar prohibition against parking in front of his home on Clayton Road at the approach to the signal light standard erected at that point. As a result, he is left with no recourse except to park in

his driveway leading out into Glen Ridge Avenue, or else at a point on Clayton Road slightly east of his home, where the city has made provision for the parking of several cars in an endeavor to solve the doctor's problem as best it may with regard to the best interest of all the people. By arrangement between Dr. Nemours and the city, a test case was brought through the medium of his arrest for parking his automobile in the no-parking zone on Glen Ridge Avenue, and on the subsequent appeal of the case to this court, the validity of the ordinance was sustained. City of Clayton v. Nemours, Mo. App. 164 S. W. (2d) 935.

Insisting that defendants, by their acts and conduct, were unlawfully, wrongfully, and oppressively depriving them of free access to, and the use and enjoyment of, Glen Ridge Avenue as a private street, and were threatening to deprive them of the right to enjoy Moorlands Addition as a restricted residential area, plaintiffs prayed in their petition that defendants be restrained and enjoined from operating the automatic traffic signal on Glen Ridge Avenue; from dividing Glen Ridge Avenue into traffic lanes; from marking the curbs and placing no-parking warning signs on the streets; from arresting, or threatening to arrest, plaintiffs, their guests, servants, or employees for parking their automobiles on Glen Ridge Avenue alongside plaintiffs' home; and from enforcing the ordinances heretofore referred to in so far as they purported to regulate traffic upon Glen Ridge Avenue.

It was further prayed that the court, by its decree, should compel defendants to remove from Glen Ridge Avenue the traffic pad, together with all the wires, conduits, and other accessories thereto belonging which had been laid, in, upon or under Glen Ridge Avenue as a part of the signal; and that defendants should be restrained and enjoined from in any way hindering or impeding plaintiffs in the full enjoyment of their residence and private street, which, by the terms of the conveyance of the property, they possessed, enjoyed, or had acquired.

As has already been indicated, defendants put their defense upon the theory that the things of which plaintiffs complained were to be justified as a valid exercise of the

police power, and that in any event plaintiffs were estopped to complain of the installation and maintenance of traffic controls on Glen Ridge Avenue by reason of the action of their agents in having purportedly granted an easement to the city for such purpose.

If it be true that the steps taken by the city are to be justified as a valid exercise of the police power, it matters not whether plaintiffs might be otherwise estopped to complain, so that the case is logically to be considered from the standpoint of the fundamental question involved, which is whether, notwithstanding the private ownership and maintenance of Glen Ridge Avenue, the public use to which it has been put by the sufferance and permission of its owners warrants the city in adopting the measures it has taken for the regulation of traffic upon it.

It is at once apparent that our decision in City of Clayton v. Nemours, supra, has substantially determined the several questions upon which the result in the present case depends.

In that case, which involved the validity of the ordinance prohibiting parking on Glen Ridge Avenue for 115 feet north of Clayton Road, we pointed out that every citizen holds his property subject to the valid exercise of the police power, and that in the event of a conflict between his individual interests and those of society as a whole, he must subordinate his private rights to a reasonable and proper exercise of the police power for the promotion and furtherance of what is conceived to be the general welfare. So it is, we observed, that the state, when fulfilling its duty of protecting the rights and property of persons while upon or using roads within its borders, may extend its supervision to roads not duly constituted public highways if commonly used for public travel (Phillips v. Henson, 326 Mo. 282, 30 S. W. 2d 1065); and so likewise may a city, in the exercise of the power delegated to it by the state, regulate the use of vehicles or other means of transportation upon all streets and roadways which are rightfully made use of by the public within its municipal limits, regardless of their legal status. This for the reason that it is the public use to which a street is put that gives rise to the city's right and

duty to regulate the movement of traffic upon it, so that if a street is in fact permitted to be made use of for the pleasure and convenience of the public at large, the character of its legal ownership will be immaterial upon the question of its being subject to regulation and control by proper city ordinances. Crossler v. Safeway Stores, Inc., 51 Idaho 413, 6 P. 2d 151, 80 A. L. R. 463.

Under the undisputed evidence in this case, there can be no denying the fact that Glen Ridge Avenue, by the sufferance and permission of its owners, has been allowed to become a public street so far as the question of its use is concerned, subject only to the right of its owners to revoke the license thus impliedly granted at any time they so elect. However, so long as the owners do not see fit to exercise their power of revocation but instead permit the street to remain open as a way or place for vehicular travel by the public, the necessity for regulation will exist in no less degree than if the street were publicly constituted and maintained; and the city, during all such time, may prescribe and enforce reasonable rules by which the privilege thus extended may be enjoyed by all the members of the general public, including the owners of the street and the proper members of their families, who must likewise be obedient to the regulations thus imposed. Commonwealth v. Gammons, 40 Mass. 201, 23 Pick. 201.

There is no contention by plaintiffs that the measures taken by the city towards the regulation of traffic upon Glen Ridge Avenue are in and of themselves unreasonable in relation to the hazard which exists at the point of its junction with Clayton Road, but only that in view of the private ownership of Glen Ridge Avenue (disregarding all question of its public use), the assumption of control by the city amounts to an illegal taking of plaintiffs' private property and an unwarranted interference with their rights as abutting owners.

We can only repeat what was said in City of Clayton v. Nemours, supra, which is that the city has not in any sense taken over Glen Ridge Avenue, but that instead it is the owners themselves who have knowingly and voluntarily allowed the street to be used by the public generally so as

to have given rise to the situation which necessitates the regulation of traffic upon it. The owners may of course exclude the public from it at any time they wish, and if such right of revocation is ever exercised, the city's power and duty to regulate will automatically terminate, and any ordinance to that end become at once inoperative by reason of the removal of the sole basis upon which it depends for its validity.

As for the rights of plaintiffs as abutting owners, those rights are subject to such reasonable limitations as may be necessary for the public good (Wilhoit v. City of Springfield, Mo. App. 171 S. W. (2d) 95); and nothing which has been done by the city constitutes an unreasonable impairment of any special right which accrues to plaintiffs by reason of their position as abutting owners. The evidence establishes that there has been no interference with their right of ingress and egress to and from their property; and while the establishment of the no-parking zone alongside their property undoubtedly results in considerable inconvenience, the circumstances nevertheless indicate that the prohibition of parking at that point is both reasonable and necessary if the regulation of traffic is to be made effective. The availability of a street for the purpose of travel is always the paramount consideration to which the right of an abutting owner to occupy or make use of it for any other purpose is necessarily permissive and subordinate.

It follows from all that has been said that plaintiffs made no case for injunctive relief; and the judgment rendered by the circuit court in favor of defendants should therefore be affirmed. The Commissioner so recommends.

BENNICK,
Commissioner.

APPENDIX "C"

IN THE ST. LOUIS COURT OF APPEALS

No. 26,134

164 S. W. 2nd 935

CITY OF CLAYTON,

vs.

PAUL R. NEMOURS

This case originated in the Police Court of the City of Clayton, Missouri, upon the filing of a complaint charging defendant, Paul R. Nemours, with the violation of Ordinance No. 647 of said City, in that on July 26, 1941, he had unlawfully parked his automobile in a no-parking zone on Glen Ridge Avenue, near its intersection with Clayton Road, in an area and at a point where parking was prohibited by the ordinance.

Convicted in police court, defendant appealed to the Circuit Court of St. Louis County, wherein, at the conclusion of all the evidence, the court, at defendant's request, peremptorily instructed the jury to return a verdict finding defendant not guilty. Plaintiff, City of Clayton, in due time filed its motion for a new trial; and this being overruled, judgment was entered discharging defendant in accordance with the directed verdict of the jury. The case reaches this court on plaintiff's appeal from such judgment in favor of defendant.

At the outset of the case we are confronted with defendant's motion to dismiss the appeal upon the ground that plaintiff city had no right of appeal from the judgment entered in defendant's favor in the Circuit Court of St. Louis County.

Defendant bases his contention almost entirely upon the assumed effect of two statutes, the one, Section 7140, R. S. Mo. 1939, Mo. R. S. A. Sec. 7140, and the other, Section 7363, R. S. Mo. 1939, Mo. R. S. A. Sec. 7363.

Section 7140, which is a part of the chapter and article relating to cities of the fourth class (of which the City of Clayton is one), provides that in all cases before the mayor or police judge arising under the ordinances of the city, an appeal may be taken by either the city or the defendant from the judgment of the mayor or police judge, except from judgments on a plea of guilty; that such an appeal shall be taken to the court having criminal jurisdiction, and shall be taken in the time and manner provided by the statutes in relation to appeals from judgments of justices of the peace in misdemeanor cases; and that upon such appeal, the appellate court shall proceed with the cause in the same manner as is provided in cases of appeals from judgments of justices of the peace in misdemeanor cases.

Section 7363, which is a part of the provisions made applicable to all cities and towns, provides that appeals from police courts and for violation of an ordinance of a city, town, or village shall be in the nature of criminal appeals from judgments of justices of the peace.

From all such statutory provisions, which signify that in the case of an appeal from the judgment of a police court in a proceeding for violation of an ordinance the subsequent procedure in the circuit court must be in accordance with the criminal and not the civil code, defendant reasons that the city's right of appeal in the event of a judgment in favor of the defendant must likewise depend upon the criminal code, which, being silent upon the question (and the right of appeal being purely statutory), would denote, according to defendant's theory in the matter, that the city has no right of appeal from a judgment for the defendant in the circuit court.

While it is true that in the case of an appeal from the judgment of a police court the circuit court is required to follow criminal procedure just as though the case were before it on an appeal from the judgment of a justice of the peace upon the defendant's conviction of a misdemeanor (Noll v. Alexander, Mo. App., 282 S. W. 739), this does not mean that the case itself becomes a criminal case in the circuit court so as to place the city in the same position as the state in so far as concerns its right to appeal from a judgment in favor of the defendant.

It has been taken as settled for years in this state that a prosecution for the violation of a city ordinance is a civil action (City of St. Louis v. Stubley, Mo. App., 154 S. W. (2d) 407), though concededly resembling a criminal action in its effects and consequences. Regarding it with respect to both form and substance, it partakes of some of the features of each character of action, although its similitude to either is not complete. Stevens v. Kansas City, 146 Mo. 460, 48 S. W. 658; City of St. Louis v. Ameln, 235 Mo. 669, 139 S. W. 429.

In the sense that its primary object is to punish, a prosecution for the violation of a city ordinance is undoubtedly criminal in its purpose, but nevertheless civil in form, and especially so when regarded as an action for the recovery of a debt representing the amount of the fine or penalty imposed against the defendant for violation of the ordinance. Where the punishment prescribed by the ordinance may, in the first instance, be the imprisonment of the defendant, the conception of the action as one for the recovery of a debt will of course no longer obtain (City of St. Louis v. Von Hoffmann, 312 Mo. 600, 280 S. W. 421), but even so the proceeding, though its sole object is to punish, is nevertheless not a proceeding to punish for the commission of a crime in the accurate legal sense of the term. This for the reason that a crime is an act committed in violation of public law, that is, a law coextensive with the boundaries of the state which enacts it, while an ordinance, on the contrary, is no more than a mere local police regulation passed in pursuance of and in subordination to the general or public law for the preservation of peace and the promotion of good order in a particular locality. Ex parte Hollwedell, 74 Mo. 395; State v. Gustin, 152 Mo. 108, 53 S. W. 421. In other words, where the defendant's act or omission is a crime, it is an offense against the public at large and punishable as such, but where it consists only in the violation of a municipal police regulation, it is merely an offense against the municipality, which the state does not undertake to punish, but permits the city itself to punish by a summary penal proceeding instituted in the city's own name and prosecuted in whatever municipal court may be constituted for the exercise of such limited jurisdiction.

But even though, for the reasons pointed out, a proceeding to enforce the penalty of an ordinance does not rise to the dignity of a criminal prosecution, it is nevertheless so closely related to a criminal case, and the consequences of a conviction are so nearly identical with those of a conviction of a crime, that the Legislature has wisely provided by the two statutes in question that an appeal from a police court shall be regarded as in the nature of a criminal appeal, and shall be proceeded with in the circuit court according to the rules of criminal procedure. However, as pointed out in King City v. Duncan, 238 Mo. 513, 142 S. W. 246, such a prosecution remains a civil case, which means that in determining the question of the substantive right of appeal, the matter is to be viewed from the standpoint of the rights in that respect which are accorded to the parties to an action under the civil code, Sec. 1184, R. S. Mo. 1939, Mo. R. S. A. Sec. 1184.

So far as concerns the right of a municipality to appeal from a judgment in favor of the defendant in a proceeding for violation of an ordinance, the general rule would seem to be that the municipality has such right, if the proceeding is regarded as civil in its nature. 2 Am. Jur. Appeal and Error, Sec. 228. That such a proceeding is regarded as civil in our own state is well settled by the decisions; and consequently, when the defendant prevails in the circuit court, not only may the city move for a new trial for error allegedly committed against it (City of Carthage v. Bird, 146 Mo. App. 325, 129 S. W. 1054), but it may also appeal as in the case of any other party to a civil action who is aggrieved by the judgment in favor of his adversary. City of St. Louis v. Bender, 248 Mo. 113, 154 S. W. 88; City of St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878; City of Springfield v. Starke, 93 Mo. App. 70.

It follows from all that has been said that plaintiff's appeal was properly allowed in the instant case; and defendant's motion to dismiss the appeal must therefore be overruled.

Passing to the merits of the case, the ultimate question for decision is whether the court committed error in peremptorily directing a verdict in favor of defendant.

Glen Ridge Avenue, so far as its ownership and main-

tenance is concerned, is a private street in the City of Clayton, running north and south through Moorlands Addition, a restricted residential area, from Clayton Road on the south to Wydown Boulevard on the north.

By the original deed dated December 11, 1922, title to all the streets in the tract laid out and platted as Moorlands Addition was vested in three designated trustees and their survivors and successors, to hold the same as joint tenants for the exclusive use and enjoyment of the owners of the lots in the Addition and their heirs and assigns. The trustees were impressed with the duty of thereafter caring for and maintaining such streets, for which purpose they were empowered to levy assessments against the several lots in the Addition, with the assessments to be apportioned to and against the lots in a manner specified in the deed. Provision was made that upon the death of the last survivor of the three trustees originally designated in the deed, title to the streets should thereupon vest in the then owners of the lots located in the Addition, said title to be free of the trust, but subject to all the continuing easements, conditions, restrictions, covenants, and charges made applicable thereto and binding thereon. It was further provided, however, that upon the termination of the trust, the owners of the lots in the Addition might continue to perpetuate its object and intent with respect to the use and maintenance of the streets by choosing agents to act for them, whose powers and duties in that regard should be substantially the same as those of the original trustees. As a matter of fact, this very situation had come about; and at the time of defendant's arrest the control of the streets was reposed in three agents who had been duly chosen by the lot owners, as evidenced by an instrument prepared and filed of record on January 9, 1934.

Notwithstanding its private ownership, the evidence was undisputed that save for one week in the year when its north and south entrances are closed off alternately, Glen Ridge Avenue is not only permitted to be open for public traffic, but indeed is extensively used for such traffic, both by persons residing in the Addition, and also by those members of the general public who may desire and have occasion to make use of it as a thoroughfare between Clayton Road

and Wydown Boulevard. It is in fact continually used for automobiles, trucks, and other vehicles, just as is true of all the other privately owned streets in the Addition as to which a similar license extends. Incidentally, the evidence shows that it was thus open at both ends for public travel at the time of defendant's arrest on the charge involved in this proceeding.

By ordinance No. 647, which is entitled "An Ordinance Regulating Traffic Upon the Public Streets of the City of Clayton", it is made unlawful for any operator "to park any vehicle on any street or in any district lawfully designated by ordinance as a place where parking is prohibited". A street or highway, within the contemplation of such ordinance, is defined as "every way or place open for vehicular travel by the public, regardless of its legal status, and regardless of whether it has been legally established by constituted authority or by user for the statutory period of time as a public highway". For violation of the ordinance or of any rule or regulation of the Street Commissioner pursuant thereto, a penalty is provided in the form of a fine of $1 to $100, imprisonment not to exceed 90 days, or both such fine and imprisonment. A subsequent ordinance (Ordinance No. 1056), which is to be read along and in conjunction with Ordinance No. 647, directs the Street Commissioner to erect standard traffic signs prohibiting the stopping, standing, or parking of any vehicle "on both sides of Glen Ridge between Clayton Road and a point 115 feet north of Clayton Road."

Not only did the ordinance impose such restriction on parking for a distance of 115 feet to the north of Clayton Road on either side of Glen Ridge Avenue, but in order to establish effective traffic control the city also erected an electric stop-and-go signal at the point of the intersection, whereby the flow of traffic into and out of Glen Ridge Avenue is automatically controlled. Lines or markers have been painted upon the surface of the street dividing the whole of the 26 feet of the paved width of Glen Ridge Avenue into three traffic lanes, in the center one of which there has been placed a metal pad, contact with which by the wheel of an automobile causes the red lights of the electric signal to stop traffic on Clayton Road, and permits the

making of a left turn from off of Glen Ridge Avenue into Clayton Road. The east lane is used by vehicles which may at all times make a right turn from Clayton Road into Glen Ridge Avenue, while the west lane permits a right turn at all times from Glen Ridge Avenue, into Clayton Road.

Defendant resides, as a member of the family, in the home of his mother, which is located on the northeast corner of Glen Ridge Avenue and Clayton Road. The house faces on Clayton Road; and the area in which parking is prohibited on Glen Ridge Avenue extends to the rear along the west side of the lot to a point within a few feet of the driveway which leads into the garage.

It was an admitted fact that at the time of his arrest defendant's automobile was parked in the no-parking zone on the east side of Glen Ridge Avenue alongside his mother's property. A conviction followed in police court, but upon his appeal to the circuit court, he was discharged in accordance with a directed verdict which was returned at the close of all the evidence. As already indicated, the case comes to this court on the city's appeal from such judgment of acquittal in the circuit court.

The character of the ownership of Glen Ridge Avenue being what it is, defendant poses the question before the court as being one of whether plaintiff city has the power to prohibit the parking of an automobile on a private street located within its geographical limits. This, however, represents only a partial view of the situation, and patently omits all reference to the material and modifying features of the evidence upon which the result in the case depends. If the question, in the abstract, were merely one of whether the city might prohibit parking on private property, the answer would undoubtedly be in the negative (Ex parte Corvey, 220 Mo. App. 602, 287 S. W. 879), to say nothing of the fact that the city, by its ordinance, has undertaken no such thing. On the contrary, the ordinance which defendant is charged with having violated is, by its title, an ordinance purporting to regulate traffic upon the public streets of the City of Clayton, so that the question presented is whether, under the undisputed facts of the

case, Glen Ridge Avenue may be said to be a public street within the contemplation of the ordinance. If so, it is obviously because of the use to which it is applied; and the actual question, therefore, is whether the regulatory or police power of the city may be extended over Glen Ridge Avenue, notwithstanding its private ownership and maintenance, in view of the fact that by the permission and invitation of its owners, it is devoted to public use, and is extensively used by the general public in accordance with the license granted.

Every citizen holds his property subject to the valid exercise of the police power, and in the event of a conflict between his individual interests and those of society as a whole, he must subordinate his private rights to a reasonable and proper exercise of the police power for the promotion and furtherance of what is conceived to be the general welfare. So it is that the state, when fulfilling its duty of protecting the lives and property of persons while upon or using the roads of the state, may extend its supervision to roads not duly constituted public highways if commonly used for public travel (Phillips v. Henson, 326 Mo. 282, 30 S. W. (2d) 1065); and so likewise may a city, in the exercise of the power delegated to it by the state, regulate the use of vehicles or other means of transportation upon all streets and roadways which are rightfully made use of by the public within its municipal limits, regardless of their legal status. It is the public use to which a street is put that gives rise to the city's right and duty to regulate the flow of traffic upon it; and if the situation is such that a street is permitted to be made use of for the pleasure and convenience of the public at large, the character of its ownership is immaterial upon the question of its being subject to control and regulation by proper city ordinances. Crossler v. Safeway Stores, Inc., 51 Idaho 413, 6 P. 2d 151.

As an adjective, the word "public" has a dual meaning, depending upon the sense in which it is employed. In one sense it may be employed to describe the character in which a thing is held, while in another and equally proper sense it may denote the use to which the thing is put. 50 C. J. 845.

In the latter sense of the term there seems to be no escaping the conclusion that Glen Ridge Avenue is a public street in so far as concerns the question of the right of plaintiff city to control and regulate the use and operation of motor vehicles upon it. This solely for the reason that by the sufferance and permission of its owners it has been allowed to become a way or place open for vehicular travel by the public, or, in other words, a de facto street, to all practical intents and purposes amounting to a public highway just as in the case of the legally constituted public streets and alleys within the muncipality. Crossler v. Safeway Stores, Inc. supra.

Nor does this conclusion in any way entrench or encroach upon the rights of private property, or serve to confer upon the city any title to the street. Concededly the owners of Glen Ridge Avenue may exclude the public from it at any time they wish. The license heretofore granted to the general public to use the street will continue only so long as it may suit the convenience of those whose power it is to grant or to deny the license. But so long as the owners of the street, by sufferance or permission, do allow the street to be used by the general public in the manner which the evidence discloses, the necessity for regulation will exist in no less degree than would be the case if the street were publicly owned and maintained; and the city, during all such time, may prescribe reasonable rules by which the privilege thus extended may be enjoyed by all members of the general public, including the owners of the street and the proper members of their families, who must likewise conform to the regulations thus imposed. Commonwealth v. Gammons, 40 Mass. 201, 23 Pick. 201.

It follows from all that has been said that the circuit court was in error in peremptorily directing a verdict for defendant, and the judgment of the circuit court must therefore be reversed and the cause remanded. The Commissioner so recommends.

BENNICK,
Commissioner.

IN THE SUPREME COURT OF THE UNITED STATES

No. 747

No. 39,003 (Mo. Sup. Ct.)

CITY OF CLAYTON, a Municipal Corporation, *Respondent*,

vs.

PAUL R. NEMOURS, *Appellant*

No. 748

No. 39,004 (Mo. Sup. Ct.)

CITY OF CLAYTON, a Municipal Corporation, *Respondent*,

vs.

MRS. A. NEMOURS, *Appellant*

Stipulation

It is hereby stipulated and agreed by and between the above parties through their respective counsel, that the above two cases may be consolidated in the Supreme Court of the United States and that Appellant's Abstract of the Record to be filed in the said United States Supreme Court in City of Clayton, a Municipal Corporation, vs. Mrs. A. Nemours, No. 39,004, may be used also in the case of City of Clayton, a Municipal Corporation, vs. Paul R. Nemours, No. 39,003; that briefs to be filed in City of Clayton, a Municipal Corporation, vs. Mrs. A. Nemours, No. 39,004, may also be used in City of Clayton, a Municipal Corporation, vs. Paul R. Nemours, No. 39,003, when the above causes reach the United States Supreme Court, it being the intention of the parties to consolidate the cases and use one record and one set of briefs.

It is also stipulated, in order to keep the records clear, that the automobile involved in the alleged violation of ordinances applicable to the case of Mrs. A. Nemours, No.

39,004, was parked on the east side of Glen Ridge Avenue, while the automobile involved in the alleged violation of ordinances applicable to the case of Paul R. Nemours, No. 39,003, was parked on the west side of Glen Ridge Avenue, the records otherwise being the same.

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